



PREVAILING WAGE DETERMINATIONS SUSPENDED UNTIL FURTHER NOTICE: HOW DO I FILE A PERM LABOR CERTIFICATION?

Posted on August 12, 2011 by Cora-Ann Pestaina

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The Department of Labor (DOL) has announced that the Office of Foreign Labor Certification (OFLC) National Prevailing Wage Center (NPWC) has temporarily suspended processing of prevailing wage determinations (PWD), redeterminations, and Center Director Reviews. The NPWC handles PWDs for the PERM labor certification, H-1B, H-1B1 (Chile/Singapore), H-2B and E-3 programs. As a result of the suspension, prevailing wage requests filed since early June 2011 are still pending. Previously, such requests were routinely processed in 3-4 weeks.

In response to practitioners' inquiries concerning pending requests, the NPWC has been issuing the following e-mail:

The OFLC National Prevailing Wage Center is experiencing delays in processing prevailing wage determinations as it is currently working to reissue certain determinations to comply with a court order issued June 15, 2011 in the United States District Court for the Eastern District of Pennsylvania. A Notice of Proposed Rulemaking was published in the Federal Register on June 28, 2011, and a Final Rule will be published on August 1. All Center resources are currently being utilized to comply with this court order. The processing of Prevailing Wage Determinations, redeterminations, and Center Director Reviews has been temporarily suspended. Processing will resume as soon as full compliance with the court order has been completed by OFLC. If you have further questions concerning your PWD, please

contact 202-693-3010.

In an August 30, 2010 decision in [CATA v. Solis](#) the District Court ordered the DOL to promulgate new H-2B prevailing wage regulations. When the DOL made a decision to delay, by almost one year, the effective date of those regulations, the Federal Court found that the DOL violated the Administrative Procedure Act by imposing the delay without engaging in notice and comment. The Court also found that the DOL acted in contravention of the Immigration and Nationality Act because it justified the delay by pointing to potential hardship to employers—a consideration that was outside the scope of the DOL's congressional mandate. The year-long delay in implementing the new wage regulations would require the continued payment of a lower and invalid wage to H-2B workers. In a [June 15, 2011 court order](#), the Court mandated a change in the effective date of those regulations.

In order to comply with the Court order, the [DOL issued a final rule](#) published in the Federal Register on August 1, 2011, with an effective date of September 30, 2011. There are existing H-2B temporary labor certifications covering work to be performed after September 30, 2011, for which the previously issued PWDs no longer apply. The NPWC is now utilizing all of its resources to reissue approximately 4000 PWDs to reflect the new H-2B wage rates that will apply for H-2B employment on or after September 30, 2011. In the rule published on August 1, 2011, the DOL indicated that they will be able to reissue all of the required H-2B wage determinations before October 1, 2011 but not before August 31, 2011.

The temporary suspension of processing on PWDs greatly impacts the PERM labor certification process. PERM is the first step of the green card process for foreign nationals seeking permanent residence through their employment. The PWD is an extremely important component of the process and pursuant to 20 C.F.R. §656.40, obtaining a PWD is a mandatory step under PERM. In accordance with 20 C.F.R. §656.40(c) PWDs are issued with a validity period between 90 days and 1 year from the date of determination and in order to use a PWD, the employer must file the PERM application or begin required recruitment within the validity period of the PWD.

Under 20 C.F.R. § 656.10, the employer must post the Notice of Filing for at least 10 consecutive business days between 30 and 180 days before filing the PERM application and the Notice of Filing must contain a wage that is equal to

or greater than the PWD. In addition, under 20 C.F.R. §656.17, the mandatory recruitment steps must be conducted at least 30 days, but no more than 180 days, before the filing of the application. Employers who commenced PERM recruitment prior to obtaining the PWD may now have to watch the recruitment expire if the PWD is not issued in time. The employer may have to conduct new recruitment once the NPWC resumes processing of PWDs.

Conducting new recruitment could be a very expensive process for the employer. But, beyond that, the inability of the employer to file a PERM application on behalf of a foreign national in H-1B status may have more far-reaching effects. §106(a) of the American Competitiveness in the 21st Century Act (AC21) allows one to apply for a 7th year H-1B extension if a labor certification or an I-140 petition was filed 365 days prior to the end of the 6th year in H-1B status.

Accordingly, if, due to the current suspension of processing, an employer is unable to file the PERM prior to the commencement of the foreign national's 6th year in H-1B status, this may affect the foreign national's ability to extend his or her H-1B status at the end of the 6th year.

There are a few steps employers may take to cope with the current delays in processing and to ensure that they are able to timely file their PERM applications and utilize recruitment before it expires or to protect the foreign national's ability to extend H-1B status in the US.

Utilize a previous PWD

An employer is permitted to use the same PWD for multiple PERM applications if the PWD is for the same occupation and skill level; the same wage source is applicable; and the same area of intended employment is involved. Therefore, a PWD issued in relation to a previous PERM could potentially be used for other PERMs.

Utilize an expired PWD

If the employer commenced its earliest recruitment during the PWD's validity

period, then there is clearly no need to obtain a new PWD and the employer may file the PERM application utilizing the expired PWD.

The DOL previously denied PERM applications where the employer commenced recruitment before the PWD's validity period and filed the PERM application after the PWD had expired. However, under the Board of Alien Labor Certification Appeals' (BALCA) recent decision in [Matter of Horizon Computer Services, Inc. 2010-PER-00746](#) (May. 25, 2011), the employer can rely on an expired PWD in the filing of a PERM application if the employer initiated at least one recruitment step during the PWD's validity period. That is, the first day of at least one form of recruitment must fall within the PWD validity period. Conducting or initiating all recruitment prior to the PWD's validity period and then filing after the PWD has expired will likely still result in a denial of the PERM application. The DOL has not yet indicated that it will follow *Matter of Horizon Computer Services* and employers who intend to rely on this case ought to bear in mind that the employer in that case initiated MOST of its recruitment during the PWD validity period. (See my previous blogs on this topic at <http://tiny.cc/mtv39> and <http://tiny.cc/9u8zp>.)

Predicting the PWD

Practitioners can predict what level and wage will be assigned to any position by going through the same analysis in which the DOL will engage. The Prevailing Wage Guidance (See "Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs," published on AILA InfoNet at Doc. No. 10019468 (posted Jan. 4, 2010)) provides a detailed description of the four levels, as well as a worksheet at Appendix C and instructions specifying five steps to determine the prevailing wage level. Once the PWD has been predicted, the employer can post the Notice of Filing. This way, the employer will not be forced to wait until the NPWC resumes processing and actually issues a PWD in order to post the Notice of Filing. If the Notice of Filing has already been posted and the employer has complied with the mandatory 30-day quiet period, once the NPWC issues the PWD, the employer may quickly proceed to file the PERM application. If the employer is clearly offering a wage that is excess of any PWD that the NPWC could issue, then the employer need not estimate the PWD and need not wait for the PWD before posting the Notice

of Filing.

In the event that the NPWC issues a PWD that exceeds the predicted wage listed on the Notice of Filing, the employer will have no choice but to post a new Notice of Filing bearing the new, higher wage. If the wage was listed in any other forms of recruitment, then that recruitment will have to be restarted. All of this will delay filing of the PERM. The employer will have to conduct precise calculations to ensure that all recruitment occurs within the 30 - 180 day timeframe prior to filing a PERM application.

Hopefully, come October 1st, the NPWC will resume processing on PWDs, etc. As usual, these requests will be processed on a first come, first served (FIFO) basis and no expedite requests will be accepted. Practitioners must continue to file requests for PWDs to secure a place in the lengthening queue.